Examiners' Report
Lead Examiner Feedback

June 2022

Pearson BTEC Level 3 Nationals
in Applied Law
Unit 3: Applying the Law (20170K)

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Grade Boundaries

What is a grade boundary?

A grade boundary is where we set the level of achievement required to obtain a certain grade for the externally assessed unit. We set grade boundaries for each grade, at Distinction, Merit and Pass.

Setting grade boundaries

When we set grade boundaries, we look at the performance of every learner who took the external assessment. When we can see the full picture of performance, our experts are then able to decide where best to place the grade boundaries – this means that they decide what the lowest possible mark is for a particular grade.

When our experts set the grade boundaries, they make sure that learners receive grades which reflect their ability. Awarding grade boundaries is conducted to ensure learners achieve the grade they deserve to achieve, irrespective of variation in the external assessment.

Variations in external assessments

Each external assessment we set asks different questions and may assess different parts of the unit content outlined in the specification. It would be unfair to learners if we set the same grade boundaries for each assessment, because then it would not take accessibility into account.

Grade boundaries for this, and all other papers, are on the website via this link:
http://qualifications.pearson.com/en/support/support-topics/results-certification/grade-boundaries.html

Awarding BTEC qualifications in 2022

Ofqual has set out their plans for awarding qualifications in 2022 and intend to return to a normal, pre-pandemic, approach to grading standards over by 2023. They have confirmed that 2022 will be a transition year, to reflect that we are in a pandemic recovery period and students' education has been disrupted.

Our guiding principle and approach to awarding BTEC qualification results in 2022 will be to ensure parity in relation to the approach being taken for GCSE and A level learners. BTEC courses have a different structure and design to academic qualifications - BTECs are modular qualifications (with assessments taking place throughout the course) compared to GCSEs and A levels which are linear (assessed and awarded at the same time at the end of the year), and therefore our approach needs to be different.

In 2022 we will return to the usual method of calculating BTEC qualification results, however adaptations including, U-TAGs and reduced internal assessment, are in place to provide a comprehensive package of support for students.

The basis of our awarding approach to BTECs this year is to ensure it is as fair as possible for all learners. We will use a range of evidence to set grade boundaries for the external units. Part of this evidence will be to closely monitor learner performance in all assessments that contribute to learners' final qualification grade, to ensure parity with A level and GCSEs.

Further information can be found on our website and via our Social Media channels.

Unit 3 (20170K): Applying the Law

Grade	Unclassified	Level 3			
		N	P	M	D
Boundary Mark	**0**	**13**	**26**	**41**	**57**

Introduction

The 2206 series was the first summer assessment of Unit 20170K Applying the Law since June 2019, following the cancellation of the 2006 and 2106 series.

Much like the 2201 series, there was an anticipated increase in the number of learners sitting the assessment during the June 2022 exam series. Whilst this was slightly lower than January, the increase in numbers is still significant. As explained in the 2201 Lead Examiner's Report, this was due to the phasing out of the QCF Subsidiary Diploma in Applied Law, with centres transferring onto the new specification. As such, many of the new Centres are less familiar with the format and assessment of the paper. Students performance overall was, however, good and in line with previous sessions.

Unit 3 (20170K) forms one of the two mandatory externally assessed unit on the Extended Certificate in Applied Law and is assessed twice yearly in January and May. This was the sixth external assessment and third January series of Unit 20170K Applying the Law. The assessment continues to be based on the well-established format of two key events; the Part A pre-release followed approximately two weeks later by the Part B assessment itself, which is a 2-hour session of two tasks, each worth 36 marks. The Part B assessment is taken under the supervised and controlled conditions on a date timetabled by Pearson (please refer to the Administrative Support Guide for Unit 3 for further information). It should be noted, the learners are encouraged to split their time equally across the two tasks.

As has been identified in all previous Lead Examiners Reports, the Part A pre-release is intended to act as a catalyst for further research for learners. It consists of two new reports, one on homicide, and the other on offences against property. The Part A pre-release will indicate which offences learners will be required to explain and apply to the additional information provided in Part B. In Part B, learners are provided with additional material for the relevant homicide and property offences, as well as information on police powers and general defences. In this series, the focus of Activity 1 was murder and loss of control, accompanied by the police power of stop and search, and Activity 2 was criminal damage with the defence of duress by threats.

This unit is synoptic to the Extended Certificate in Applied Law, meaning that learners are required to draw on skills, knowledge and understanding acquired from the three other units they have studied within the specification when completing both of the set tasks. For example, in unit 1 learners have studied the concept of precedent and will therefore understand that the caselaw they are referring to when determining the criminal liability of the defendants in both activities are examples of precedents set by the higher courts that lower courts are bound to follow in future, similar cases. In addition to this, the fact that learners are

required to apply their learning to realistic contexts in all units is a skill that they are able to draw on when completing the tasks for this unit. The assessment of both tasks in the unit is based around five assessment foci which are distributed across the 36 marks as follows:

- AF1: Selection and understanding of legal principles relevant to context (8 marks)
- AF2: Application of legal principles and research to information provided (8 marks)
- AF3: Analysis of legal authorities, principles and concepts (8 marks)
- AF4: Evaluation and justification of decisions (8 marks)
- AF5: Presentation and structure (4 marks)

There are some administrative requirements that must be completed as part of the Part B Set Task and, as has been indicated in previous Lead Examiner's Reports, these are not completed fully by all centres.

Learners produce their work for both activities using a computer. The two activities, along with a candidate declaration of authenticity are then submitted along with a learner record and centre record which is found within the Administrative Support Guide. There were a number of centres who submitted work without including the learner record sheets. Centres should ensure that they are submitted all information required by the Administrative Support Guide.

Introduction to the Overall Performance of the Unit

The overall performance of learners within this session was very good – with detailed and well thought out responses demonstrating a good understanding of the legal issues raised by both the Part A pre-release and the Set Task Information within Part B. There was no discernible difference in performance between Activity 1 and 2, demonstrating that learners were well-prepared for undertaking the assessment. The majority of learners were able to discuss that gross negligence manslaughter and theft were the relevant offences, and that arrest and intoxication were the additional "unseen" aspects of this series. As has been noted in the majority of previous sessions, police powers within Activity 1 performed slightly better than the defence of intoxication within Activity 2, potentially due to the fact that many centres were unprepared for this general defence as it has been paired with criminal damage in the past.

It should be noted that within Activity 1, there was a high proportion of learners who chose to discuss corporate manslaughter, despite the fact that the offence was gross negligence manslaughter. Centres should encourage

learners to make more effective use of the cues in the Part A material, as opposed to attempting to predict the offence.

Areas of good practice

Despite the high numbers of new centres undertaking the assessment for the first time, there was evidence of some well prepared learners, who showed a good understanding of the relevant areas of law.

Both activities were well-structured, with learners attempting to both explain and apply the law throughout their responses. Within their explanations, learners were including reference to a range of supporting authority in the form of both case law and statute law.

Areas requiring improvement

The areas requiring improvement have been well-versed in previous Lead Examiner's Reports, but they are worth reiterating here:

- Learners are only required to discuss the relevant law raised as part of their Part A research – establishing whether a homicide is a murder or not is not required for all offences. The only times in which murder will be relevant is a) where the homicide offence is clearly a murder; or b) where there is the potential for the defendant to plead one of the partial defences of loss of control or diminished responsibility. Learners should be focusing their discussion on the relevant areas of law to maximise both their time and the depth of their explanation/application. Similarly, in Activity 2, learners need only focus on the relevant property offence and are not required to list all of the potential property offences before settling on one.
- There were a vast amount of learner who were under the perception that involuntary manslaughter is a partial defence to a murder charge, as opposed to being an offence in its own right.
- Learners should not restate the facts of the Set Task Information in their introduction; this is unnecessary and does not attract credit.
- Police powers and defences will not appear in both activities – learners should read the Set Task Information carefully to determine where issues relating to the unlawful use of police powers or the availability of a defence arises. This will be made clear, with directions such as "X had made a complaint about his/her treatment by the police…"
- Learners should be encouraged to focus on the specific police power or general defence that is being raised, as opposed to listing all of the ones on the specification. Learners will not achieve credit for a discussion of the police powers/general defences which are not contained within the appropriate activity.

Individual Questions

As stated in the introduction, both activities are divided between the 5 assessment foci.

- **AF1** (knowledge and understanding) assesses the ability of learners to identify the correct homicide or property offence and explain its component parts
- **AF2** (application) is awarded for the application of the relevant legal rules relating to homicide or property offences to the facts if the scenario.
- **AF3** (analysis) in the present series was assessing the ability of learners to respond to the additional information relating to police powers and general defences
- **AF4** (evaluation and justification of decisions) is awarded on the basis for learners to conclude on liability and, where necessary, provide evaluative commentary
- **AF5**: (presentation and structure) is awarded for the completeness of the task

Activity 1 (Homicide and Police Powers)

Homicide

For Activity 1, learners are told within the Part A pre-release that the victim (Beth) has been thrown to her death from a poorly maintained rollercoaster car which the defendant (Amy) was responsible for. The reference to the fact that were are told that the defendant was responsible for the ride and there have been allegations that she has failed to maintain it, clearly indicates gross negligence manslaughter, as there is a clear duty of care (the defendant towards those those getting on the ride) which has been breached (through failing to ensure the ride has been maintained adequately.

The reference to the defendant's name is important – some learners believed this to be an issue of corporate manslaughter, due to the fact that the ride was at a funfair, believing the funfair to be a corporation. Were this an issue of coporate manslaughter, it would be the funfair who would be ebing investigated as opposed to the defendant, as coporate manslaughter is concerned with the liability of coporations, as opposed to individuals.

The Part B Set Task Information expanded on the information presented in Part A, pointing firmly to the offence of gross negligence manslaughter using the principles from either ***R v Adomako*** and ***R v Broughton***:

- Amy has operated the ride for 10 years, with sole responsibility for all aspects of the ride, including its maintenance. This emphasises that this is an issue of gross negligence manslaughter as there is no indication that Amy is part of a corporation. This also points to a duty of care arising towards those who use the ride.
- The ride has not been serviced for more than five years, despite the fact that industry practice states this should occur every 3 months. This indicates a clear breach of duty of care as she has fallen below the standards of the reasonable ride operator.
- There is a broken safety harness which would not have properly secured anyone sat in that seat. This was something that the defendant had been aware of from social media posts, but chose not to rectify on order to save money. This raises several potential issues: a) this could raise another potential duty situation of creating a dangerous situation, which Amy has breached as she has fallen below the standards of reasonable ride operators; b) the failure to fix the safety harness on the ride created a serious and obvious risk of death; c) Amy was at this point grossly negligent in failing to fix the harness as this shows a disregard for the life and safety of others; and d) fixing the harness would have saved the life of Beth. Points b), c) and d) are what the court states in ***R v Broughton*** are essential in establishing liability for gross negligence manslaughter.

As indicated earlier, there were many learners who viewed this as an issue of corporate manslaughter as opposed to gross negligence manslaughter. These two offences do share some elements, such as owing a duty of care; breach of duty and causing death. As such, learners who opted to discuss this offence did receive some credit for their discussion of the core elements.

Duty of care

Both ***R v Adomako*** and ***R v Broughton*** make it clear that in order to establish liability in gross negligence a duty of care must be owed by the defendant towards the victim. There were a variety of ways in which a duty of care could be established:

- Under ***R v Pittwood*** using the contractual relationship between Amy as the ride operator and Beth (and any customer on the ride);
- Under ***R v Miller*** through creating a dangerous situation as Amy had failed to maintain the ride and was aware of the broken harness;

- Through the based neighbour principle from ***Donoghue v Stevenson*** as anyone getting on the ride would be closely and directly affected by Amy's actions of failing to maintain the ride/fix the broken harness and allow people to continue getting on the ride.

Any of the above approaches would be correct. There were several learners, however, who determined that the applicable duty was that from ***R v Stone and Dobinson***. This was not an issue of voluntary assumption of responsibility, as Amy has not assumed responsibility over those getting on the ride in the legal sense; it was more appropriate to establish the duty under the three duties referred to above. The vast majority of learners chose the ***R v Pittwood*** approach to establish the duty between Amy and Beth. This was the case even for learners who selected corporate manslaughter to discuss, although there were some who referred to corporate manslaughter case law for establishing a duty, which would not always be creditworthy.

Many learners included reference to ***Caparo v Dickman*** and ***Robinson v Chief Constable of West Yorkshire***, and produced a full and detailed explanation and application of these terms, as well as referring to a range of potential means of establishing a duty of care. It is not necessary for learners to approach their explanation in this manner; they should be encouraged to include the most relevant and appropriate legal principles within their responses to allow for stronger application.

Candidate example

In this sceneario, it is clear that the defendant Amy who was in charge of operating the ride and had sole responsiblitiy of all aspects of the ride definitely owed her victim a duty of care This is because it was her on job duty to look after all riders and ensure that their safety comes first in which she hasn't done so. This relates to the caase of R v Pitwood whereinjh the defendant lifted the gate to allow a cart to pass and thenb went off to lunch failing to put it back down. A train later collided wuith a horse and cart killing the train driver. His contractual duty was to close the gate. This conludes that Amy had a contractual duty. Also, the neighbour principle can be applied which was established in the Donoghue v Stevenson case wherein Beth was 'closely and directly affected' meaning that there was Amy owed a duty on the basis of proximity.

Comment: here the candidate has explained the requirement of a duty of care and has clearly explained the basis for Amy's duty of care is the fact that it is er job to look after all riders and ensure their safety. They have established this convincingly using the principle from *R v Pittwood* but have supported it with *Donoghue v Stevenson.* The learner has therefore selected the most appropriate legal principle, without referring to irrelevant information.

Breach of duty of care

There was little difficulty in learners establishing that Amy had breached her duty of care towards Beth. Learners were able to confidently explain that a breach of duty of care occurs when the defendant falls below the standard of the reasonable person, and more able learners were able to discuss the fact that Amy would be compared to the reasonable ride operator. Application of this point was confident, examining that the reasonable ride operator would have both serviced the ride every three months as was required, and would not have permitted people to continue to get on the ride with it in that state.

What was disappointing was that there were relatively few learners who referred to the legal basis for breach of duty. For example, learners could have explained that ***R v Adomako*** held that the normal rules of negligence apply when establishing a breach of duty and used the principle from ***Blyth v Birmingham Waterworks.***

Below is a candidate example of a good explanation and application of breach of duty of care in which the learner has supported their discussion with reference to supporting case law:

Candidate example

The second part of R v Adomako is the breach of the established duty of care. There is a lot of different case law that can be applied for different situations in a GNM case, for Amy's case the cases of Blyth and Bolam apply. For GNM defendants will always be measured against a reasonable person, this 'reasonable person' would be the same age, gender and in the same circumstances as the defendant, this kind of test exists to show if the defendant was acting rationally, sensibly and reasonably. Case law Blyth involves this principle directly, this case asks if the defendant did anything that the reasonable person would not do.

In Amy's case a reasonable person would have done their job as intended and ensured that the ride was serviced every three months as in accordance with standard industry practice, Amy failed to do this.

The other case law that applies here is Bolam, this case law looks at the standard of care that is expected from the defendant. The standard differs based on who the defendant is and case law Bolam states that for professionals the standard expected is higher than that of an average person.

In Amy's case, she is a professional. She has ten years of experience with operating the ride and due to this she should know what is expected of her and what is necessary to ensure the safety of riders. This raises the standard of care for her meaning more was expected of her to avoid a mistake such as Beth's Case.

Comment: Here, the learner has explained that in order to assess breach of duty, a defendant is judged against the standards of the reasonable person. Despite the fact that their explanation of this is slightly inaccurate, they were able to explain that this tests asks whether the defendant did anything that the reasonable person would not do. They have indicated that the defendant would be judged against the standards of the professional and have produced a detailed application of the fact that the reasonable person would have had the ride serviced, which Amy failed to do.

Causing death

For gross negligence manslaughter, it must be established that the defendant's breach of duty was the cause of death – meaning that there must be established a clear link between what the defendant did/failed to do that the death of the victim. The facts of the Set Task Information present a relatively straight forward issue of causation. Amy has failed to have the ride maintained/rectify the broken harness and this resulted in the death of Beth as she was not properly secured in the seat and fell from the ride. To this end, learners were not required to produce an overly in-depth discussion of causation and could deal with it swiftly by stating that the defendant needs to be both the factual and legal cause with a brief explanation/application of both points with relevant case law.

Learners did not appear to struggle with this and the majority produced some competent responses. Relatively few discussed irrelevant issues of causation, such as switching off life support.

Candidate example

The next part is establishing that the breach was the causation of death. Causation is found using case law Pagett and the But, for test. This test when applied may read But, For Amy neglecting her duties of ensuring regular ride safety checks and listening to the complaint about the broken harness she saw online Beth would not have died whilst riding the coaster. After this case law smith can be looked at, this is another test called the operative and substantial test, this is very straightforward as it just asks if the defendant (Amy) was an operative and substantial factor in the victim's death, which in this case Amy was. No intervening Acts apply.

Commentary: In this example, the candidate has explained and applied causation briefly but accurately. The learner has clearly indicated that were it not for the actions of the defendant in failing to perform the safety checks, the victim would not have died, and they have identified that there are no intervening actions. A supporting case is referred to. As stated above, as there were no issues of causation, such as intervening acts, a lengthy discussion was not required.

Gross negligence

The issue of gross negligence was dealt with to varying degrees depending on whether they selected gross negligence manslaughter or corporate manslaughter. Learners who determined the offence to be corporate manslaughter did not discuss this element in depth. Corporate manslaughter requires there to have been a gross breach of duty and learners who went down this route focused on the breach of duty issue, neglecting the discussion of the requirements for the defendant to have shown a very high degree of negligence (***Andrews v DPP)*** or a disregard for the life and safety of others (***R v Bateman***).

Learners who selected gross negligence manslaughter on the whole produced a good explanation of this aspect of the offence, although application was variable. Once again, learners did struggle with the concept of gross negligence and confused it with the issue of breach of duty within their application. In addition to this, learners would either deal with the issue of gross negligence or the related concept of risk of death, as opposed to discussing both concepts. The case of ***R v Broughton*** emphasises that these are interlinked and both must be

established for a successful conviction for gross negligence manslaughter. Furthermore, there were some learners who asserted that because there had been the death of Beth, that this was evidence of showing disregard for life and safety of others – the gross negligence links to the breach itself meaning that at the time the defendant failed to act as others in their position would have, they were judged to be acting grossly negligent.

Candidate example

The third element looks at whether the defendant's actions were in fact grossly negligent. The 'gross' part looks at death. Lord Mackay LC said that it is 'a test of how far conduct mus depart from accepted standards to be characterised as criminal'. This can be a criminal act or omission. This is proved through the Bateman test which was established in the infamou test of *R v Bateman (1925)*. The test lays out a basic principle that there needs to be a disregard for life and safety of others which can amount to requiring punishment. Amy's actions led to Beth's death which is gross behaviour on its own. She shows a complete disregard to life when she chooses to do nothing about the safety complaints and does not follow standard industry practices. I believe that through the Bateman test, Amy's actions were grossly negligent.[redacted]

Commentary: In this example, the learner has provided the correct explanation of the test under *R v Bateman.* In terms of their application, initially, they did provide an incorrect application by asserted that the actions led to the death simply being seen as evidence of grossness on their own, which is not quite the correct interpretation of the *Bateman* principle. However, they have correctly linked the fact that the defendant knew of the broken safety harness and chose to do nothing was evidence of that Any showed disregard for the life and safety of others. The learner could have taken this a little further and explained that this was due to the fact that anyone sitting in the seat would not have been secured, however, overall, this learner has provided a good explanation and application of the law to the facts.

Serious and obvious risk of death

R v Misra and Srivastava as recently updated by ***R v Sellu/R v Rose/R v Broughton***, makes it clear that there must be a clear and obvious risk of death and not just injury arising out of the breach of duty of care and consequent grossness. As stated above, the approach of learners was to deal with either gross negligence or risk of death and not both. Where risk of death was explained, this was largely done well although, as with gross negligence, may did assert that because the victim died this would mean that there was a clear and obvious risk of death – again, this is not quite the correct interpretation of this element.

The idea of serious and obvious risk of death is stated in ***R v Broughton*** as:

"something much more than minimal or remote. Risk of injury or illness, even serious injury or illness, is not enough. An obvious risk is one that is present, clear, and unambiguous. It is immediately apparent, striking and glaring rather than something that might become apparent on further investigation."

In addition to this, there were learners to confused the idea of foreseeability in terms of the risk of death with issues relating to causation. Despite this, many learners did produce a good discussion of this aspect of the offence where they chose to discuss it.

Candidate example

[redacted] Next we must look at whether there was a serious and obvious risk of death and whether that risk was reasonable foreseeable; the term 'serious' is defined as something which is more than minimal and in this case it can be said that not having well maintened safety equipement could be seen as more than a minimal factor which could lead to death when on a dangerous ride. The term 'Obvoius' must be immdeiately clear and unambiguous that the the risk of death would have occured; Here, it is clear that Not have well maintened saftey equipement when tasking part on a fast and dangerous ride coud definately lead the death of anyone who uses it. Therefore it can be seen that there was a serious and obvious risk of death-It can also be said that there is and obvious risk of death as not having a working saftey harness on a fast and dangerous ride could easily lead to someone falling out. When looking at reasonabley foreseeable, it must be reasonably foreseeable at the time of the breach; Here had Amy forgot to have the maintenance for the ride done after the first 3 months then it may not be reasonable foreseeable that there could be a broken harness however, she had not had the maintenace done for more than 5 years and without correct/working harnesses on the ride while riding it, it is reasonably foreseeable that a broken harnes could lead to someone falling out of the ride which could lead to there death. [redacted]

Commentary: despite the lack of legal authority, it is clear that in this section the learner understands the concept of risk of death. They have explained the law as clarified under *R v Broughton* well, without specifically mentioning that case. A good application is shown, with the learner linking the idea that there is an obvious risk of death from not having a working safety harness on a fast and dangerous ride, due to the fact that someone could easily have fallen out.

Evaluative commentary and justified conclusions

In this series, there were relatively few instances of learners including evaluative commentary, despite gross negligence manslaughter arising in a previous series with the Mark Scheme and the Lead Examiner's Report for that session providing some good examples that learners could include were the topic to arise.

Where evaluative commentary was included, there were three main approaches:

1. Providing evaluative commentary for corporate manslaughter, which would not attract credit as the evaluative commentary included must be relevant to the substantive law raised by the facts of the Set Task Information
2. Providing evaluative commentary that was vague/undeveloped. If learners do include evaluative commentary, this must be meaningful
3. Providing a couple of pieces of good evaluative commentary, which although brief demonstrate an understanding of the problems with the law relating to gross negligence manslaughter. The example below demonstrates this approach.

Candidate example

Gross negligence manslaughter is problematic as it mixes the civil concepts of negligence and duty of care with criminal liability. Moreover, the test of Adomako is circular in that it requires the jury to convict the defendant of the crime if they believe it was criminal.

Commentary: although this is a brief piece of evaluation, this would attract at least two marks as the learner has included two pieces of evaluative commentary, which were coherently explained. Learners do not need to produce excessive amounts of evaluative commentary to attract marks.

It was pleasing to see that the majority of learners in this series were providing justified conclusions in which they drew together their discussion of the case law and its application to the facts of the Set Task Information to provide an overarching conclusion. The best approach to enable learners to do this is to encourage learners to sub-conclude as they go along and then finish with a short, overarching conclusion. The conclusion must go beyond a bald statement that "Amy will be guilty of gross negligence manslaughter.

Below is a good example of how a learner would reach a justified conclusion:

Candidate example

Given all of the above facts, I can say with confidence that Amy did commit gross negligence manslaughter. It is proven that she did owe a duty of care to Beth because she was the operator of the ride and therefore had a duty to keep Beth safe on the ride. She then breached this duty by not ensuring that the ride was safe despite being made aware that it wasn't and letting Beth onto the ride with that knowledge. This also showed that her actions were grossly negligent and that there was a risk of death. Therefore showing that she is guilty of gross negligent manslaughter.

Commentary: as can be seen, the learner has concluded on each of the elements of gross negligence manslaughter to reach an overall conclusion on liability.

Helpful tips for future papers in relation to homicide

- Learners do not need to establish that a murder has not been committed before going on to discuss involuntary manslaughter – murder should only be discussed if the question raises the issue of murder, or voluntary manslaughter.
- Emphasise the distinction between voluntary and involuntary manslaughter – many learners were of the opinion that involuntary manslaughter was a defence to murder.
- Discourage learners from restating the facts of the scenario in their introduction – this wastes time and they will not gain cedit for this.
- Encourage learners to be selective in their use of legal principles – for exmaple in an offence like gross negligence manslaughter, it is not necessary for learners to include referece to every potential duty situation in law, only that which would be relevant to the scenario.

Police powers

As Centres are aware, the police powers aspect of Activity 1 assesses the ability of learners to analyse and respond to the additional information relating to police powers which is not given advance indication of within Part A.

It should be noted that any mention of the police in the Part A is simply to introduce the substantive element and not as an indication of which police power will be presented in Part B. Thus, the fact that Part A referred to the

fact the defendant was “questioned” did not raise the issue of interviews and questioning. Part B made it clear that the core issue under discussion in relation to police powers was that of arrest.

In order to score highly on the police powers section, learners should identify the power that has potentially been breached, explain how that power should legally exercised, apply this to the facts of the scenario and finally reach a conclusion on the lawfulness, or otherwise of the actions of the police.

There were three key issues requiring discussion in the present series:

1. When Amy was arrested she was not given a reason for her arrest: An arrestee must be told that they are under arrest and the reason for their arrest.
2. The police did not explain why her arrest was necessary: it must be necessary to arrest an individual with reference to the necessity test.
3. The police failed to read her the caution: the police must read the arrestee the caution to inform them of their right to silence.

It would appear that there were many learners who were not well-prepared for this aspect. Many learners provided a general explanation of all potential police powers, without focusing specifically on the power of arrest. Those who did discuss the power of arrest did show some confusion between the issue of ‘reasonable grounds’ and the suspect being told the reason for the arrest. Reasonable grounds refers to the grounds that the police must hold for the rest, whether this be that the defendant has committed, is committing or is about to commit a crime. The suspect must be told of the specific reason that they are being arrested.

Many learners referred to “Miranda rights” when discussing the caution. This did not attract credit as this is the American approach to cautioning, which is slightly different to our approach. Learners should be discouraged from referring to American rules and use of the phrase “Miranda rights”.

Mamy learners confused the issue of arrest with that of stop and search and referred to stop and search legal authority. In addition to this, when learners were referrign to legal authority, many simply referred to “PACE” or the Police and Criminal Evidence Act 1984. The legal authority should be more specific, such as s24 Police and Criminal Evidence Act 1984 as amended by s110 Serious Organised Crime and Police Act 2005, or Code G/C. PACE by itself would not amount to authority.

Below is an example of a band 3 response to the police powers section:

Candidate example

Following her arrest, Amy made a complaint about the treatment by the police. The police have to follow set procedures which are laid out in the *Police and Criminal Evidence Act (1984)*, also known as PACE. When you have been arrested, you are still entitled to your rights and this must be ensured by the officers. You must be given a reason for your arrest but Amy was not given that. In addition to this, she was not told why her arrest was necessary which also breaches PACE because you can only be arrested if it is necessary because of reasons such as: failing to co-operate with an ongoing investigation, if you are believed to be threat to yourself or the public or if you are a suspect in a case. Amy also said that the police failed to read her the caution which means that her arrest was unlawful and this could damage the case significantly. The evidence gathered from her arrest cannot be used in court because she was not cautioned and it could even lead to case being acquitted all together, which is the most likely outcome. 3C

Commentary: here, the learner has explained hat the defendant must be given a reason for the arrest and provided examples of when an arrest will be necessary. Whilst indicating that the defendant has not been read the caution and correctly concluding this was unlawful, they have not provided an explanation of the caution itself. In addition to this, the learner has not provided adequate supporting authority to enhance their answer. Overall, however, this is a good response to the police powers aspect of Activity 1.

Helpful tips for future papers in relation to police powers

- Discourage learners from including all potential police powers and focus on the most relevant.
- Learners need to explain why the behaviour of the police is unlawful.
- Specific legislation/case law for the police power in question must be included, a reference simply to PACE will not be adequate.
- Learmers should concluded on the lawfulness or otherwise of the exercise of the police powers.

Activity 2 (Property Offences and General Defences)

Theft

Within Part A, learners are told that the defendant, Alfred, has appeared in court for allegedly keeping change which he was overpaid at a supermarket. The reference to the overpayment is a clear indication of the principle under s5(4) Thest Act 1968, in which where property is received by mistake, there is an obligation to restore it. This therefore clearly points to the

offence of theft being the relevant property offence within this series. This was confirmed by the Part B material, with the following being raised by the further information:

- The defendant had went to do his shopping and when he paid at the till, he was given an extra £20 note in his change – this indicates a) that the property is money; and b) that the property has been received by mistake, meaning that it is still classed as belonging to the Big Food Megestore.
- Alfred counted the change, knew he had been given to much and left the store – it is at this point that Alfred has appropriated the money by keeping it and his actions a) show that he is dishonest bu the standards of the reasonable man; and b) that he had a clear intention to permanently deprive as he has left the store.

As has been common in previous sessions, learners performed better in Activity 2 as compared to Acitvity 2. The reason for this is likely to be the statutory basis for the property offences, which provide a clear framework within which to explain and apply the law. Learners had little difficulty in indicating that the offence of theft was present within the scenario. Although, there were a large proportion of learners who believed this to be an issue of burglary, potentially due to the fact that the theft occurred within a shop. Learners who did discuss burglary still recevied credit as they invariably discussed the offence of theft within their discussion.

Actus reus of theft

The *actus reas* was confidently explored by many, with reference to statutory and case law examples of supporting authority to enhance their discussion.

The issue of appropriation under s3 was relatively easy to establish as Alfred appropriated the property when the kept the money and left the store. Many learners relied on the principle from ***R v Lawrence*** in establishing that there had been an appropriation as the cashier has given the money over to Alfred. This was a good argument, although for this to apply there would need to have been some deception on the part of Alfred in order to obvtain the money.

Learners has no issue in establishing that the money would amount ot property under s5(4).

What was disappointing, however, was that many learners failed to discuss the obvious issue of property received by mistake, with reference to either s5(4) or the ***A-G's Ref (No 1 of 1983).*** In fact, there were many learners who asserted that the property belonged to Alfred as it was in his possession/control.

Other learners asserted that the *actus reus* had not been committed and that it was the cashier's fault for giving him too much money. Furthermore, there was a slightly confusion between the issue of property received by mistake and that of appropriation.

The example below is a competent explanation and application of the *actus reus* aspects of theft:

Candidate example

In order to establish this as the case you have to work through the different aspects of the law, this starts with the actus reus of theft which begins with appropriation. Appropriation can be many different acts but is defined as assuming the owners' rights over the property, this could be by destroying it, selling it, keeping it, taking it, lending it out and many others. This is a lot to go through but case law Morris states that the defendant only needs to assume one of the owners' rights of the property.

In Alfred's case him taking the money is assuming the owners rights of possession of their property.

S4 of the Theft Act 1969 covers what property is. Property has 5 main categories which are money (physical forms of money- notes and coins), real property (property attached to land like a home or garden fence), personal property (like handbags or car keys), things in action and intangible property.

In Alfred's case he has appropriated money as he has taken a £20 note.

S5 is belonging to another. This states that property belongs to anyone in possession of it o who has a proprietary interest in it. This also contains some case law, the one that applies to Alfred's case is Attorney General's (AG) Reference (No.1 of 1983) which states that property given by mistake must be returned. This applies perfectly to Alfred's case as the money was given to him by mistake and therefore still belongs to the Big Food Megastore and needed to be returned.

Commentary: As can be seen, the learner has accurately explained the three aspects of the *actus reus* of theft with appropriate supporting case law. They have stated that the appropriation took place when Alfred took the money, that the £20 would amount to property and that as it has been received by mistake Alfred is under a duty to return it. An excellent response to this aspect of the offence of theft.

***Mens rea* of theft**

The two aspects of the *mens rea* of theft are dishonesty with intention to permanently deprive. The issue of intention to permanently deprive did not present any issues as it is clear that he did not intend to return the money given that he counted it, knew he had been overpaid and then left the store. What did present somewhat of an issue for the learners was the issue of dishonesty. It was clear from the facts of the scenario that none of the honesty situations from s2 would apply: Alfred did not genuknely believe he had the right in law; he did not beliebve that the owner could not be found; and he did not believe that the owner would consent. As such, it was not necessary to go into depth about these issues and learners could simply have moved onto assessing whether Alfred had been dishonest according to the priciple from ***Ivey v Genting Casinos/R v Barton and Booth.*** Many learners did go into detail about the principles from s2, and determined that they would not apply. This obviously wasted time.

When learners did discuss the common law definition of dishonesty, there was a great numer who referred to the outdated test from ***R v Ghosh***. As this has been overruled by ***Ivey v Genting Casinos/R v Barton and Booth***, learners could not attract credit for this. The decision in ***Ivey*** was in 2017, and whilst this was a civil appeal, the 2020 decision of ***R v Barton and Booth*** makes it clear that the ***Ghosh Test*** no longer applies. As such, when applying dishonesty, learners must consider the following:

a) What was the defendant's actual state of knowledge or belief of the facts?; and

b) Based on those facts was his conduct dishonest by the standards of ordinary decent people?

There were many learner who, despite recognising that the Ghosh test has been overruled and who referred to Ivey, then went on to discuss the Ghosh test in their work instead.

Candidate example

Next is the Mens Rea of theft, this starts with s2 and dishonesty. Dishonesty is defined using case law Barton and Booth which states that dishonesty is measured by the standards of an honest and reasonable man, this means that if the defendant has done something that an honest and reasonable man in the same circumstances as the defendant would deem dishonest they will be guilty.

In Alfred's case he would indeed be seen as dishonest by the standards of an honest and reasonable man as he was aware that the cashier had given him an extra £20 by mistake but decided to stay quiet so that he could keep it.

Lastly there is s6 which is the intention to permanently deprive the owner of their property. This intention can be defined in case law Lavender which states that it is treating the property as your own regardless of the owners' rights.

For Alfred's case this can be shown as he walked out with the extra £20 and his shopping, at that point he had realised that he had been given the extra in mistake but decided he wanted to keep it, him walking out of the store shows that he had no intention of giving the money back as he would have just gone home after that. With this all the elements of Theft have been met and a full Theft has been completed.

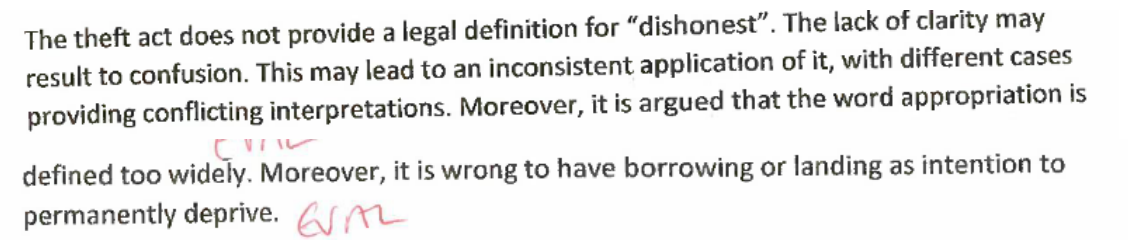
Commentary: Here, the learner has correctly focused on the test for dishonesty from *Ivey/R v Barton and Booth*, although they could have briefly stated that the test for honesty under s2 would not apply. Despite the fact that their explanation of the dishonesty test is not entirely accurate, they have indicated that Alfred's behaviour would be judged from the standards of the reasonable man and would be classed as dishonest.

Evaluation and justification of decisions

Evaluative commentary was even less common within Activity 2 as compared to Activity 1. Where it was provided, some learners tended to focus this on the problems with the ***Ghosh Test*** which would attract credit as this test has been overruled – however, if learners stated that it was a problematic defition of dishonesty and discussed the improvements made by the updated tests from ***Ivey/R v Barton and Booth.***

As with Activity 1, learners do not need to provide extensive evaluative commentary, they simply need to provide some indication of problematic areas within the law.

Candidate example


The theft act does not provide a legal definition for "dishonest". The lack of clarity may result to confusion. This may lead to an inconsistent application of it, with different cases providing conflicting interpretations. Moreover, it is argued that the word appropriation is defined too widely. Moreover, it is wrong to have borrowing or landing as intention to permanently deprive.

Commentary: in this example, this learner would attract two marks; they have indicated the problem with the fact that the Theft Act does not provide a definition of dishonest and the relative problems with this, as well as indicating the issues with appropriation and intention to permanently deprive – with slightly more development this could have achieved three/four marks.

In relation to justification of decisions, as with Activity 1, learners should be sub-concluding throughout their work, reaching an overarching conclusion at the end – this was not something which learners struggled with in Activity 2.

Helpful tips for future papers in relation to theft

- Learners should use more up-to-date law – the Ghosh Test has been overruled and should not be referred to, unless it is to provide a discussion of how the test from Ivey has improved the law.
- Encourage learners to pay more attention to the wording of Part A – if issues such as overpayment are referred to in the pre-release this will require a discussion in Part B.
- Learners should only refer to relevant information – where issues such as the property are not in issue on the basis of the facts of the Set Task Information, extensive discussion of this is not required.
- Basic evaluative commentary should be inclueded for all property offences

Intoxication

The general defence within the present series was that of intoxication. It was clear that many learners were not adequately prepared for this offence, potentially due to the fact that in the past, intoxication has been paired with criminal damage and that as this is theft, insanty or automatism would have been more appropriate.

The aspects requiring discussion were:

1. Alfred admitted he had been drinking all day: this points to voluntary

intoxication and therefore the rules relating to this aspect of intoxicatiomn should be applied – as theft is a specific intent offence, if successful this would mean that the rule from ***R v Lipman/Sheehan and Moore*** would apply so that the offence would be dropped to the basic intent equivalent. As there are no basic intent equivalent offences to theft, a successful ple would result in an acquittal.

2. Alfred states that he knew what he was doing despite the fact that he was drunk: in order to successully plead intoxication, all *mens rea* must be removed. It is clear that Alfred would not be able to use the defence of intoxication.

Learners were able to explain that the intoxication was voluntary, however the application of the rules beyond that was not as strong as they could have been. Many learners were unsure of the distinction between specific intent and basic intent offences and believed that theft was a basic intent. Others believed that Alfred would be successful in his plea of intoxication stating that his *mens rea* has been removed, despite clear indication in the Set Task Information that Alfred was fully aware of what he was doing. Given these issues, it was rare for learners to score highly on this aspect of Activity 2. In addition to this, many learners employed the approach of included all potential defences and police powers (despite there being no indication of police powers being relevant to Activity 2).

Candidate example

However, Alfred would likely raise the defence of intoxication to help him in his case. The defence of intoxication is defined in various cases which will be associated with legal principles shortly, and is a defence used which states that the defendant commit the crime due to their mens rea being affected by alcohol or drugs.

As per the case of R v Gallagher, voluntary intoxication and specific intent crimes means that the defendant intended to commit the crime whilst intoxicated. This would result in the defence failing and a guilty verdict being issued. Subsequently to reviewing the evidence, this is what Alfred has committed.

In this case, Alfred's intoxication was voluntary as he had spent the afternoon drinking a variety of alcoholic drinks in a pub with his friends, which on its own is not a problem, however, it shows that his drinking was recreational and thus his intoxication was voluntary.

In this case, Alfred's crime of theft was a specific intent crime as "although he was drunk, he knew what he was doing at the time he decided to keep the change", this shows that he intended to commit the crime at the time of being voluntary intoxicated, this shows it is not just a basic intent crime where he was just reckless, but instead knew he was taking too much money from the cashier.

Therefore, we can conclude that Alfred was voluntarily intoxicated and committed a specific intent crime, meaning the defence of intoxication would fail and Alfred will likely receive a guilty verdict, as per the case of R v Gallagher.

Commentary
In the above example, the learner has indicated that the intoxication was voluntary, and shown an awareness of the fact that theft is a specific intent crime. They could have provided a more accurate discussion of the difference between specific and basic intent crimes as they appear to be under the impression that theft could be committed recklessly. A correct conclusion is provided in which the learner indicated that the defence will be unsuccessful.

Helpful tips for future papers in relation to intoxication/general defences

- Learners should only refer to the most appropriate general defences, listing/explaining all of them simply wastes time.
- Learners need to pay attention to the wording of the Set Task Information – if it indicates that the defendant knew what they were doing, theis precludes them from being able to plead the defence of intoxication.
- Learners need to pay more attention to the distinction between specific intent and basic intent crimes.

Summary

Based on the performance of learners during this series, Centres should consider the following when preparing for the next exam series

- Learners should be effectively using the Part A pre-release to base their research on – pay attention to the indications that are provided, if there is reference to an individual being arrested it is unlikely to be corporate manslaughter, similarly if there is an indication of a principle such as that from s5(4) this is likely to feature in Part B.
- Learners are not required to establish that a homicide is not murder before discussing involuntary manslaughter – they should alsobe made aware of the distinction between voluntary and involuntary manslaugher. Voluntary manslaughter is a partial defence to murder; involuntary manslaughter is an offence in its own right.
- Learners should be using up-to-date law – the ***Ghosh*** Test has been overruled and aside ffom being taugh this as an evaluative point, learners should be using the test for ***Ivey v Genting Casinos/R v Barton and Booth***
- Only relevant supporting authority is required – learners do not need to provide lengthy explanations of all relevant caselaw/statute on a

legal point.

- Learners shoud not restate the facts of the Set Task Information within the introduction – this wastes time.
- Police powers and general defences will only appear in one Activity, not both. In addition, reference to the police in the Part A does not indicate which police power will appear in Part B.

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